

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-15

DATE ISSUED: July 2, 1998

ISSUED TO: Burleigh County Auditor Kevin Glatt

CITIZEN'S REQUEST FOR OPINION

On April 29, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Gene Kouba asking whether Burleigh County Auditor Kevin Glatt violated N.D.C.C. § 44-04-18 by refusing Mr. Kouba's request for minutes of the Burleigh County Board of Commissioners meeting that was held on March 23, and by failing to explain the legal authority for the denial of his requests.

FACTS PRESENTED

The Burleigh County Board of Commissioners (Commission) held a special meeting on March 23, 1998. One of the topics considered was consolidation of the office of county auditor, currently held by Mr. Glatt, with the office of county treasurer. According to Mr. Kouba, he was the commander of the local American Legion post and was directed by the Legion to submit a letter on its behalf objecting to the proposed consolidation. The letter requested that the Legion's objections be included in the minutes of the meeting. Mr. Kouba indicates that he asked for a copy of the draft minutes from Mr. Glatt to determine if the Legion's letter was actually included in the minutes as requested.

Mr. Kouba's April 28, 1998, letter states the following allegations:

- a) March 30, 1998 - I called to request a copy of the minutes of the March 23, 1998 County Commission meeting from Burleigh County Auditor, Mr. Kevin Glatt. Mr. Glatt was not available but I was told he would call me back. He has not done so as of today.
- b) March 31, 1998 - I called Mr. Glatt's office and talked to a staff member, and asked her for a copy of the minutes of the March 23, 1998 Burleigh County Commission meeting. She told me she would have to ask Mr. Glatt if I could have a copy and she would get back to me. She never did.
- c) Because the County Auditor's office did not call me back to let me know if Mr. Glatt would allow me to have a copy of the minutes I requested, I called his

office and requested the minutes again on April 2, 1998. I was told I could not have a copy of the minutes. I have to assume this was a decision of Mr. Glatt, the Burleigh County Auditor.

- d) On April 3, 1998, I made a personal appearance at the Burleigh County Auditor's office to ask for a copy of the March 23, 1998 minutes. I was again told, by staff, I could not have a copy of the minutes. However, I was told by this same staff person that I could have a copy on Monday, April 6, 1998.
- e) Finally, on Monday April 6, 1998, I again went to the County Auditor's office and asked for a copy of the March 23, 1998 meeting minutes. I was told, by the same staff person, I could not have the requested minutes until Tuesday, April 7th, because they had not been approved by the Burleigh County Commission. This would happen at their meeting that evening.

As of today [April 28, 1998] I have not received the minutes requested or any communication from the Auditor's office that I could have a copy of the minutes. . . .

I have been informed the staff person's name I dealt with is Ms. Corrine Jochim.

In addition I was never told the legal authority for Mr. Glatt's denial of my request by anyone at the Burleigh County Auditor's office.

Mr. Glatt mailed the requested minutes to Mr. Kouba shortly after receiving an inquiry from this office regarding Mr. Kouba's request.

In response to the chronology alleged by Mr. Kouba, Mr. Glatt denies that he or anyone else in the Burleigh County Auditor's office received a request for minutes of the March 23 meeting from Mr. Kouba, either in person or over the phone. Attached to his response were sworn affidavits by Corrine Jochim, Lynette Glatt, Joanie Sanda, and Gail Rossman, employees in the Burleigh County Auditor's office. Each of the affidavits contained the following statement:

I, [name], do hereby swear and affirm that to my knowledge a Mr. Gene Kouba never left a message for Burleigh County Auditor Kevin J. Glatt, either by phone or in person. I swear and affirm that to the best of my knowledge I did

not tell Mr. Kouba or anyone else that they would have to contact Mr. Glatt to receive a copy of the Burleigh County Commission Meeting Minutes. I further swear and affirm that pursuant to office practice, minutes are available to the public at the same time they are available to staff and other departments.

Also attached to Mr. Glatt's response was an undated policy statement that the Burleigh County Auditor's office makes draft minutes of Commission meetings available to the public as soon as they are prepared.

Essentially, it is the position of Mr. Glatt and the Burleigh County Auditor's office that Mr. Kouba never requested the minutes. In a later conversation with this office, Mr. Glatt indicated it was possible that an unidentified person came to his office and requested copies of the minutes, but left after being told that the minutes were available only in draft form.

After receiving a copy of Mr. Glatt's response from this office, Mr. Kouba replied with the following documentation supporting the allegations in his letter:

- 1) A sworn affidavit from the Morton County Veterans' Service Officer indicating that he drove Mr. Kouba to the auditor's office on April 6, the date alleged in Mr. Kouba's letter;
- 2) Phone records indicating that a call was made from Mr. Kouba's work number to the auditor's office on April 2, the date alleged in his letter.

Mr. Kouba's response also stated that he had no other reason to call the auditor's office except to request minutes of the meeting. Mr. Kouba insists that he identified himself and asked for minutes, even in draft form, on several occasions but was denied.

ISSUE

Whether the Burleigh County Auditor's Office violated N.D.C.C. § 44-04-18 by denying Mr. Kouba's repeated requests for minutes of the Commission's March 23 meeting.

ANALYSIS

This opinion presents a unique situation: there is no disputed question of law. Mr. Kouba alleges, and Mr. Glatt admits, that draft minutes must be provided to any member of the public upon request. N.D.C.C. §§ 44-04-18, 44-04-21(2) ("the disclosure of minutes kept under this subsection may not be conditioned on the approval of the minutes by the governing body").

As recently explained by this office,

Attorney General's opinions under N.D.C.C. § 44-04-21.1 must be based on the facts given by the public entity. As this section indicates, the opinion process under N.D.C.C. § 44-04-21.1 is designed to address disputed questions of law in a given factual situation rather than resolve factual disputes. Whether a person has requested minutes, either in draft or approved form, is a question of fact. Therefore, I must assume, without weighing the credibility of the opinion requester against the public entity, that the minutes were never requested. Accordingly, it is my opinion that the Board did not violate N.D.C.C. § 44-04-18.

1998 N.D. Op. Att'y Gen. O-61 (June 8 opinion to Duane Mullenberg).

The same conclusion applies in this case. No matter how persuasive I might find Mr. Kouba's claims and supporting documentation, I must base my opinion on the facts presented by the Burleigh County Auditor's office and therefore I conclude that the Burleigh County Auditor's office did not violate N.D.C.C. § 44-04-18.

CONCLUSION

The Burleigh County Auditor's office did not violate N.D.C.C. § 44-04-18 by refusing to provide minutes of the Commission's March 23 meeting because I must conclude it never received a request for those records.

Heidi Heitkamp

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ATTORNEY GENERAL

Assisted by: James C. Fleming
Assistant Attorney General

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